

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2147

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JESSE PUGH,

Petitioner-Appellant,

-against-

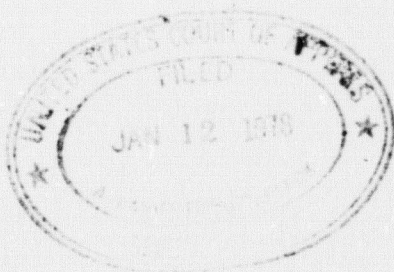
SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,

Respondent-Appellee.
-----x

Docket No. 77-2147

B
PFS

APPENDIX



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DOCKET ENTRIES

JUDGE STEWART

PRO SE

74 CIV 3988

1/29

[illegible]

JUDGE STEWART

PRO SE

74 W. 333

DATE	PROCEEDINGS
Sep. 9, 74	File petition for a writ of habeas corpus.
Sep. 9, 74	Filed order granting petitioner to proceed in forma pauperis, Conner, J.
Oct. 11, 74	Filed affidavit and order extending respondent's time to answer petition to 10/28/74-- Mac Mahon, J.
Nov. 6, 74	Filed affidavit in opposition to petitioner's application for a writ of habeas corpus.
Nov. 26, 74	Filed petitioner's answer in opposition to respondent's affidavit.
Nov. 26, 74	Filed notice of assignment to Stewart, J.
06-06-75	Filed opinion # 42552--Petitioner's application for a writ of habeas corpus is denied. So ordered, Stewart, J. (to pro se for notices)
08-04-75	Filed plaintiff's affdvt., memorandum and notice of motion for injunction pending appeal - stay of proceeding to enforce judgment (no return date) - pro-se motion.
11-20-75	Filed true copy of U.S.C.A. order that for a certificate of probable cause, for leave to proceed and for the assignment of counsel is granted and the cause remanded to Dist Court for an evidentiary hearing and that this motion for an injunction pending appeal is denied.
01-29-76	Filed petitioner's pet. for a writ of habeas corpus ad Testificandum.--writ iss. 2-19-76
07-9-76	Hearing held for a writ of Habeas Corpus & concluded. Dec. Res. STEWART, J.
07-21-76	Filed petitioner's memorandum of law in support of petitioner's application for a writ of habeas corpus
07-21-76	Filed respondent post-hearing memorandum
06-22-76	Filed petition of Laurence Stern to have pltf. appear on w/h/c. writ issued and ret. on 6-30-76
08-17-76	Filed writ to produce Jesse Pugh with marshals return to the Metropolitan Correctional Center, return to Somers Conn on 7-14-76--Stewart, J.
10-12-76	Filed transcript of record of proceedings dated 7-9-76
11-10-77	Filed MEMORANDUM DECISION. Petitioner having exhausted his state remedies, and now applied to this court for writ of habeas corpus. Petitioner's application for habeas corpus relief on the grounds of ineffective assistance of counsel at sentencing is denied--Stewart, J.
11-14-77	mailed pro-se forms L-I & I-1 to petitioner and PC to respondent
11-17-77	Filed petitioner's affdvt. and notice of motion for an order for leave to appeal in forma pauperis ret. 11-28-77
11-29-77	Filed petitioner's notice of appeal to the USCA for the Second Circuit from the order denying his application for a writ of habeas corpus. mailed copy Atty. Gen of the State of NY

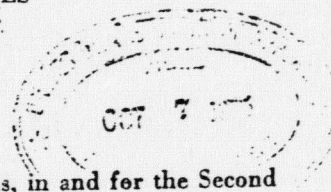
CIRCUIT COURT REMAND ORDER

"B"

PRO SE
10/1/75
75-8203

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of October, one thousand nine hundred and seventy-five.

United States ex rel. Jesse Pugh,
Appellant,

v.

J. Edwin LaVallee, Superintendent,
Appellee.

A motion having been made herein by ^{Appellant} ~~relator~~ pro se for a certificate of probable cause, for leave to proceed in forma pauperis, ~~for transcription of the records and expenses of the United States~~ for the assignment of counsel and for injunction pending appeal

Upon consideration thereof, it is

Ordered that said motion ~~be and it hereby is~~ for a certificate of probable cause, for leave to proceed and for the assignment of counsel be and it hereby is granted, and the cause remanded to the district court for an evidentiary hearing on whether the appellant was rendered ineffective assistance of counsel at sentencing. It is further ordered that said motion for an injunction pending appeal be and it hereby is denied.

JLO TJM SRW

St. Peter Waterman
James L. Burke
Thompson
Circuit Judges

DISTRICT COURT OPINION
OF JUNE 5, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA ex rel. :
JESSE PUGH, :

Petitioner, :

-against- :

74 Civ. 3887

SUPERINTENDENT CLINTON CORREC- :
TIONAL FACILITY, :

Respondent. :

----- x

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Petitioner Jesse Pugh applies to this court for a writ of habeas corpus. Petitioner, paroled in November 1971 from a sentence to expire in December 1975 for a Pennsylvania aggravated robbery conviction, was arrested in New York in December 1971 on a charge of armed robbery. Pennsylvania then issued a parole violation warrant, since a condition of his Pennsylvania parole was that petitioner remain in Philadelphia. In April 1972, petitioner plead guilty to the New York charge and was sentenced in May 1972 to a maximum seven year term "to run concurrently with [the] sentence being imposed and presently being served in the Commonwealth of Pennsylvania." At this point, as we understand it from the affidavit of an assistant in the New York State Attorney General's office, New York agreed to return Pugh to Pennsylvania

pursuant to the outstanding detainer warrant there. Two months after Pugh was returned, however, Pennsylvania decided to reparole him. Accordingly, he was returned to New York to serve the remainder of his concurrent sentence for the New York robbery.

Petitioner Pugh complains here that his transfer without a hearing from Pennsylvania to New York was an "unlawful extradition." The ground upon which petitioner wanted to challenge his extradition was the alleged unlawful nature of the plea taken in New York in April 1972. Petitioner claims that the judge "promised" to parole him at sentencing. The transcript of Pugh's plea in April 1972, however, clearly reflects that the judge did not make any such promise. In addition, petitioner was permitted to file a habeas petition in Pennsylvania before the transfer to New York. That petition, making the same claim as the petition here, was denied on August 1, 1972. Thereafter, upon his return to New York, Pugh brought the same claim in the state courts, thereby exhausting his state remedies.

There is nothing improper about such an interstate transfer for which provision is made in the New York Criminal Procedure Law (CPL) §570.12. In addition, the habeas petition which Pugh was permitted to file before his extradition is all that is provided for in the New York statutory scheme in the way of a "hearing." CPL §570.24. Therefore, we find no ground

upon which habeas corpus relief can be granted to petitioner. His application is denied.

SO ORDERED.

Charles Stewart
United States District Judge

Dated: New York, N. Y.
June 5, 1975.

DISTRICT COURT OPINION
OF NOVEMBER 7, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES EX REL. JESSE PUGH,	:	74 Civ. 3887
Petitioner,	:	
-against-	:	<u>MEMORANDUM</u>
	:	<u>DECISION</u>
SUPERINTENDENT, CLINTON CORRECTIONAL	:	
FACILITY,	:	
Respondent.	:	

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STEWART, JR., D.J.

Petitioner Jesse Pugh pled guilty to a charge of robbery second degree on April 10, 1972 before Judge John C. Couzens in Westchester County Court. He was sentenced by that Judge to an indeterminate sentence with a maximum of seven years on May 10, 1972. Subsequently, Pugh moved for vacation of the sentence. His motion was denied and leave to appeal the denial order was refused.

Having exhausted his state remedies, petitioner applied to this Court for writ of habeas corpus.¹ Pugh's petition included a claim that his plea had been involuntary because Judge Couzens had broken a promise to give him probation in exchange for his guilty plea. In a memorandum decision issued by this Court on June 5, 1975, we found that Judge Couzens had made no such promise and denied petitioner habeas corpus relief on this and other claims.

(The Court of Appeals for the Second Circuit remanded the cause to this Court for an evidentiary hearing on whether Pugh was rendered ineffective assistance of counsel at sentencing, in violation of his Sixth Amendment rights. Petitioner's claim of ineffective assistance of counsel is based on the allegation that Pugh's attorney inexplicably failed to submit medical reports which the sentencing judge had required as a condition of the "possibility of probation" for Pugh.²

(At the evidentiary hearing on July 9, 1976, there was conflicting evidence as to whether Pugh's counsel, Sam Lerner, had shown the neuro-surgeon's report to Judge Couzens at the sentencing proceeding.³ Pugh testified that the medical reports were not presented to the judge; it was conceded that no medical reports had been admitted into evidence at the sentencing; and Judge Couzens' December 20, 1973 order denying Pugh's motion to vacate sentence stated that no neuro-surgeon's report was presented for his consideration at sentencing.

(However, Lerner testified at the hearing that he showed the updated medical reports to the sentencing judge, that there were in camera conferences at the sentencing proceeding, and that Pugh therefore, might not have witnessed the presentation. Also, there was testimony that Judge Couzens' December 20, 1973 order was made twenty months after the actual sentencing, suggesting that perhaps he had forgotten the incident. Judge Couzens was not called as a witness.

Additionally, the neuro-surgeon's report introduced into evidence at this Court's hearing was dated April 14, 1972, about a month before sentencing. Also in evidence are letters from Pugh to Lerner and Judge Couzens dated a short time after sentencing, seeking to obtain reconsideration of his sentence. Neither of these letters mention a failure by Lerner to submit medical reports.

Considering these and other facts contained in the records, and testimony at the hearing, the Court finds that petitioner has not shown that his counsel failed to present the requested medical reports at sentencing.

Even assuming Lerner did fail to present to Judge Couzens the medical reports, this failure alone does not constitute ineffective assistance of counsel in violation of petitioner's Sixth Amendment's right, since it does not "shock the conscience of the court" nor "make the proceedings a farce and mockery of justice." LiPuma v. Commissioner Department of Corrections, No. 77-2006 (2d Cir. July 11, 1977); Rickenbacker v. Warden, Auburn Correct. Facility, 550 F.2d 62 (2d Cir. 1976); United States v. Wright, 176 F.2d 376 (2d Cir.) cert. denied 338 U.S. 950 (1950).

The testimony of Rakacky* and Lerner indicates that Judge Couzens was willing to consider probation seriously only if Pugh was severely paralyzed for life. Therefore, failure to submit reports was harmless error since the medical reports did not indicate such severe disability. Their

* Joseph Rakacky, the Assistant District Attorney who prosecuted petitioner.

(testimony also shows that Lerner vigorously represented petitioner at the time of plea and sentencing.

Rakacky testified that Lerner, emphasizing petitioner's physical condition to Judge Couzens, sought probation for Pugh at presentence conferences. Furthermore, Lerner obtained an indeterminate sentence for petitioner which allowed the Parole Board more flexibility in establishing his minimum length of imprisonment. Lerner also prevailed upon the judge to make Pugh's prison term run concurrently with a prior Pennsylvania sentence. Inasmuch as petitioner was a "persistent felon" who could have received a minimum of fifteen to twenty-five years, Lerner was effective in obtaining these considerations for Pugh.

(Accordingly, petitioner's application for habeas corpus relief on the grounds of ineffective assistance of counsel at sentencing is denied.

So Ordered.

U.S.D.J.

Dated: New York, New York
November 7, 1977.

FOOTNOTES

1. Petitioner is presently incarcerated in Connecticut state jail at Somers, Connecticut pursuant to a state conviction of first degree larceny in 1976. Pugh had been paroled January 5, 1975 on his New York sentence. On April 10, 1975 he committed the crime which resulted in his larceny conviction and a declaration of delinquency by the New York Board of Parole.

Presently Pugh owes three years and eight months on his New York sentence. In the instant habeas application, he seeks relief from this sentence.

2. Pugh had been shot in the spine by the police during the December 21, 1971 robbery. His physical condition was a consideration of Judge Couzens' in sentencing him as the plea minutes indicate:

THE COURT: Mr. Pugh, in conference today with your attorney and the District Attorney, and the last time we had a conference, I stated that due to your physical condition I was considering a Class D felony sentence. A Class D felony sentence would be from three to seven years in State's Prison with the possibility of probation if your physical condition can be determined on the sentencing date by a qualified neuro-surgeon; is that understood?

THE DEFENDANT: Yes.

(Plea minutes, p. 5).

3. Unfortunately no transcript of the May 10, 1972 sentencing was in the County Clerk's file. Only an extract of the proceeding was available and that was not determinative of this issue.

STATE OF NEW YORK, COUNTY OF *Westchester*

is over 18 years of age and resides at *Lawrence Stern, 111 Morris Place, New York City*



deponent

sworn

at

the

office

of

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County

of

Westchester

on

the

12th

day

of

April

1954

at

New York City

NYC



deponent

sworn

at

the

office

of

the

County

of

Westchester

on

the

12th

day

of

April

1954

at

New York City

NYC

Michael Stern
NOTARY PUBLIC
STATE OF NEW YORK

Lawrence Stern
The above signed and sworn to by me, the undersigned, on the day and date first above written.

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